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No. 61

APR 12 1930
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1929.

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner,

vs.

NIAGARA FALLS BREWING COMPANY, and PAUL A. SCHOELLKOPF, CHAS. E. HAEBERLE, FRED H. KRULL, EDSON P. PFOHL, ALBERT T. MAYLE, FREDERICK CHORMANN, RUDOLF V. ROSE, and GEORGE F. NYE, as Directors of said Company and Trustees Thereof in Dissolution,
Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 741.

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner,
v.
NIAGARA FALLS BREWING COMPANY, *et al.*,
Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 46-50) is not reported.

The opinion and findings of fact of the Board of Tax Appeals are reported in 13 B. T. A., 1040.

Jurisdiction.

The jurisdiction of this Court depends upon Section 240 (a) of the Judicial Code as amended by the act of February 13, 1925, and Section 1003 of the Revenue Act of 1926 (Act of February 26, 1926). The Circuit Court of Appeals for the Second Circuit reversed the decision of the

Board of Tax Appeals by an order entered in the office of the Circuit Court of Appeals December 16, 1929.

Questions Presented.

(1) Whether the Commissioner of Internal Revenue can, by regulation, increase the burden of the tax statute [Revenue Act of 1918, C. 18, 40 Stat., 1057, 1077, 1078, 234a (7) quoted in petitioner's brief (Page 9)] by requiring as a condition for the allowance of deductions for obsolescence that the taxpayer shall abandon the assets upon which the obsolescence deduction is claimed.

(2) Whether the taxpayer by continuing to make a cereal beverage which did not resemble taxpayer's former product either in taste or popularity, but did resemble it in appearance and was partly produced by the same machinery (R. 33) thereby failed to conform to the regulation requiring abandonment of the assets.

(3) Whether the abandonment of part of two buildings and the greatly reduced use of certain machinery was a partial abandonment of each sufficient to sustain obsolescence deductions thereon under the regulation.

These questions are referred to on Page 8 of the petitioner's brief under "Questions Presented," Paragraph 2.

The question, now contained in Paragraph 1 on Page 8 of petitioner's brief and as Specification No. 1 of "Errors to be Urged" in the petition at Page 5, whether claims for obsolescence of tangible property can be based on the imminence of prohibition legislation was neither raised, argued nor considered, before or by the Circuit Court of Appeals.

"The taxing authorities do not deny that legislation which shortens the useful life of tangible assets entitles the taxpayer to an allowance for obsolescence under the 1918 act. (Appeal of Manhattan Brewing Co., 6 B. T. A. 952, which allowed obsolescence of tangibles but not of good will, because of the imminence of prohibition.)" (R. 50.)

This is further evidenced by the Summary of Argument of the Commissioner in his brief there, set forth as Appendix "A," annexed hereto.

"As the above rulings * * * were not assigned as errors in the Circuit Court of Appeals and were not considered by it, they cannot be insisted upon here as grounds for reversal."

(*Ana Maria Sugar Company vs. Quinones*, 254 U. S. 245, 251; 65 L. Ed. 246, 249.)

Statement.

The following statement is deemed necessary to correct inaccurate statements in the petition (Page 2). The Board of Tax Appeals found that the petitioner continued to make "near beer" in order to see if the plant could be made to pay by making this product, also to keep the plant in action and save the machinery. The decision of the Circuit Court of Appeals did not merely follow its decision in *Haberle Crystal Springs Brewing Company vs. Clarke*, as implied at Page 5 of the petition for certiorari. The opinion of the Court (R. 46-50) clearly indicates that the Court was concerned with the lawfulness of the Commissioner's requirement that the assets be abandoned before they could be considered obsolescent (R. 41, 50), and decided that question for taxpayer under previous decisions of this Court.

Argument.

The decision of the Circuit Court of Appeals conformed to the decisions of the Board of Tax Appeals in other cases where obsolescence deductions had been granted although the assets upon which the deductions were based were not abandoned.

Manhattan Brewing Company, 6 BTA, 952.
Maltibestos Company, 6 BTA, 1060.
Corsicana Gas & Electric Company, 6 BTA, 565.
J. Chr. G. Hupfel, Inc., 9 BTA, 944.
Seas Shipping Company, Inc., v. Commissioner, 16 BTA, 841.

It was also in accordance with the decision of the Circuit Court of Appeals for the District of Columbia in *National Industrial Alcohol Company vs. Commissioner*, decided February 4, 1930, U. S. Daily, February 12, 1930, Vol. IV, No. 291, p. 4, not otherwise reported. No conflicting decision has been made by any Circuit Court of Appeals or the Court of Appeals for the District of Columbia.

The opinions in *Haberle Crystal Springs Brewing Company vs. Clarke*, and *Renziehausen vs. Commissioner*, in this Court, held only that brewery and distillery good will and other intangible assets could not properly be the subject of a deduction in computing income tax on account of their obsolescence due to prohibition. These intangibles are not distinguishable from "the business of brewing and distilling," which was discontinued by prohibition.

As indicated in the cases previously cited, it has been the well settled law for many years that the tangible assets used in brewing are as much a subject of a deduction in computing income tax, on account of their loss of usefulness, as the tangible assets of any other business, whether such loss of usefulness or obsolescence be due to the prog-

ress of the art or the cessation of the art through government interposition. That the Commissioner through regulation could not lay an extra burden upon the taxpayer by way of requiring entire immediate abandonment of the assets has also been the settled law for many years under the decisions of this Court, upon which the decision of the Circuit Court of Appeals was based (R. 50).

International R. R. Co. v. Davidson, 257 U. S. 506, 42 S. Ct. 179, 66 L. Ed. 341.

United States v. George, 228 U. S. 14, 33 S. Ct. 412, 57 L. Ed. 712.

Williamson v. United States, 207 U. S. 425, 28 S. Ct. 163, 52 L. Ed. 278.

The distribution of the funds of respondent Brewing Company to its stockholders has been suspended for many years by the pendency of this assessment, which is contrary to law. During the suspension the funds are unproductive. The decision of the Circuit Court of Appeals herein has served the ends of justice by permitting this taxpayer, as others similarly situated have been permitted, to deduct from its income derived from the final sales of its product in 1918 and 1919 the undisputed losses due to the obsolescence of its machinery and other tangible assets from government intervention. That decision should not be disturbed nor should its effect in releasing the funds of the taxpayer for distribution to its stockholders be delayed by the issuance of a certiorari writ. Nor should the taxpayer be put to further expense in resisting this unlawful additional assessment. For these reasons the respondent opposes the issuance of the writ.

Respectfully submitted,

BASIL ROBILLARD,
Counsel for Respondents.

APPENDIX "A".

Quotation from petitioner's brief before the Circuit Court of Appeals demonstrating that its assignment of Specification of Errors to be Urged No. 1 set forth in the petition at Page 5 was not argued or considered below:

"SUMMARY OF ARGUMENT.

"The petitioner is not entitled to deductions in the taxable years for the decline in value of its buildings, machinery, and equipment either as obsolescence or as losses sustained in such years.

"Obsolescence is the process of becoming obsolete and is an allowable deduction in a case where it is reasonably apparent that the commercial usefulness of an asset will end before the expiration of its physical usefulness. At the time that national prohibition became imminent the petitioner corporation began the manufacture of near beer in addition to its manufacture of beer of alcoholic content, using the same buildings, machinery, and equipment. It continued to manufacture near beer until its dissolution in 1921, and its plant was thereafter used for the same purpose by a lessee. As there was no lack of usefulness but only a reduced employment of the petitioner's plant due to the smaller demand for near beer, and since it could not be reasonably apparent during the taxable years that the commercial usefulness of the property would terminate before the end of its physical usefulness, a deduction for obsolescence was properly denied.

"The petitioner did not suffer a deductible loss, since there was no sale, abandonment, or other disposition of its property during the taxable year within the meaning of the Regulations and the intendment of the Act, and deductions for losses are not proper when there is only a fluctuation in the value of property. *United States v. White Dental Co.*, 274 U. S. 398, 401."